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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Charles W. Gribben, Gribben, vs. United Parcel Service, Inc., Defendant.	CIV-04-02814 PHX FJM **DEFENDANT UNITED PARCEL SERVICE'S MOTION FOR SUMMARY JUDGMENT** (Assigned to the Hon. Frederick J. Martone)

Defendant United Parcel Service moves this Court to dismiss Plaintiff Charles W. Gribben's ("Gribben") claims of disability discrimination and retaliation brought under the ADA and Title VII. Gribben worked as a shifter driver at UPS, where he operated both air conditioned and non-air conditioned trucks. Sometime during his employment, Gribben developed a heart condition that allegedly made him sensitive to hot weather. He then requested of UPS that he only drive air conditioned trucks.

UPS carefully evaluated Gribben's requests for this accommodation and determined that his heart condition and resulting sensitivity to hot weather did not measure up to the rigorous requirements of an ADA disability because it did not substantially limit him in any major life activity. Gribben's requests for an air conditioned truck were therefore denied. Gribben then refused to go to work until he was given an air conditioned truck. None were available. As a result, he was discharged for insubordination. Gribben now sues for disability discrimination and retaliation based

upon these events.

This Court should dismiss Gribben's disability discrimination claim for two reasons:

1. Gribben is not disabled under the ADA – his heart condition and resulting sensitivity to heat do not substantially limit him in a major life activity; and

2. Even if Gribben is disabled, he is unable to perform the essential functions of his job with or without the accommodation of an air conditioned truck. Even with air conditioning, the temperatures inside these trucks greatly exceed Gribben's 90-degree temperature restriction.

This Court should also dismiss Gribben's retaliation claim because:

1. Gribben was discharged for gross insubordination because he refused to work, not because he engaged in any protected activity;

2. The supervisor who made the decision to discharge Gribben had no knowledge of Gribben's protected activities until after the discharge was made; and

3. Over 16 months passed between Gribben's Charge of Discrimination and his eventual discharge from UPS. There is no causal connection between the protected activity and adverse employment action.

UPS's Motion is supported by the following Memorandum of Points and Authorities, the corresponding Statement of Facts, and the Court's entire file, all of which are incorporated herein by reference.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL BACKGROUND

Gribben commenced employment with UPS in 1982. DSOF ¶ 1. Since 1998 Gribben has worked full time days as a shifter driver. DSOF ¶ 1. A shifter driver moves large, long-haul tractor trailers from drop-off points to unloading points at UPS's distribution center. These trailers are moved using specially designed vehicles called "shifters." Hence, the job title "shifter driver." As a shifter driver, Gribben was required to operate shifter vehicles. DSOF ¶ 2. Brown tractor vehicles ("browns") are also used

for this work. Generally, browns have air conditioning, while shifters not. UPS assigns vehicles on an availability basis. Gribben was generally assigned to an air conditioned "brown" vehicle but, due to business demands, UPS could not guarantee that he would always have an air conditioned vehicle.

In the summer of 2000, Gribben suffered heart failure and was diagnosed with dilated cardiomyopathy and paroxysmal arterial fibrillation. DSOF ¶ 3. Since then, Gribben has complained that his condition prevents him from working in an environment where the temperature is greater than 90 degrees Fahrenheit for longer than 20 minutes.[1] DSOF ¶ 4, 10. As a shifter driver, Gribben is required to work outdoors in temperatures that sometimes exceed 110 degrees Fahrenheit for periods longer than 20 minutes.

Gribben made four separate requests that UPS provide him with an air conditioned truck on the job. Each request was objectively evaluated by an independent physician who was not employed by UPS. DSOF ¶ ¶ 13, 19. These independent physicians examined Gribben's medical condition using the information provided by Gribben's own physician, included in UPS's standard Request for Medical Information form. *Id*. Based upon the medical information received, UPS determined that Gribben was not "disabled" under the ADA. DSOF ¶ 15. Therefore, Gribben's requests for accommodations were denied.

On March 31, 2004, Gribben arrived for work at UPS, clocked in, but did not begin his duties as a shifter driver. DSOF ¶ 23. Instead, Gribben demanded that UPS provide him with an air conditioned truck or he would not commence work. DSOF ¶ 23. UPS dispatch personnel tried to procure an air conditioned truck for Gribben but none were

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[1] Whether Gribben's heart condition is aggravated by heat is a disputed fact. On July 31, 2002, Dr. Peter Vasquez examined Gribben and determined that there was "no objective evidence that [Gribben's] heart condition decompensates under the physiologic demands of the heat." DSOF ¶ 13. Then on April 21, 2003, Dr. N.S. Prakash determined that Gribben's condition was not exacerbated by high ambient temperatures and his condition would not restrict Gribben from engaging in the physical activity that is required of a shifter driver. DSOF ¶ 19. However, the Court need not decide this issue to resolve this case.

available. DSOF ¶ 23. Gribben refused to work without an air conditioned truck, and he was discharged by UPS District Labor Relations Manager, Jerry Dalzell, for gross insubordination. DSOF ¶ 23. When he learned that he had been discharged, Gribben smiled and thanked Dalzell for discharging him, stating that this would "mean a lot more money for him" and that this was "the best thing that could have happened to him." DSOF ¶ 24. Gribben utilized the union grievance process to challenge his discharge and was ultimately reinstated with backpay. Gribben has been back on the job as a shifter driver, utilizing vehicles with and without air conditioning, since 2004.

II. ARGUMENT AND LAW

Gribben claims that UPS discriminated against him on the basis of his alleged disability, cardiomyopathy, by failing to provide him with a reasonable accommodation and by discharging him because he was disabled. Gribben further claims that UPS discharged him in retaliation for filing a charge of discrimination with the EEOC. Gribben cannot raise a genuine issue of material fact with respect to either his disability claim or his retaliation claim, and UPS is therefore entitled to summary judgment on both causes of action.

A. Gribben Cannot State a Prima Facie Claim of Disability Discrimination Under the ADA.

To state a prima facie claim of disability discrimination under the ADA, Gribben must demonstrate that (1) UPS is subject to the ADA; (2) Gribben is disabled within the meaning of the ADA; (3) Gribben can perform the essential functions of his job with or without reasonable accommodation; and (4) Gribben suffered an adverse employment action because of his disability. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 193 (2002); 244 F.3d 675 (9th Cir. 2001). UPS does not dispute that it is subject to the ADA. Gribben, however, cannot demonstrate that he is disabled within the meaning of the ADA. Moreover, Gribben has asked that UPS eliminate one of his essential job functions as a reasonable accommodation. The ADA does not require UPS to do this. Consequently, UPS is entitled to summary judgment on all of Gribben's ADA

discrimination claims.

1. Gribben is Not Disabled.

To show that he is disabled under the ADA, Gribben must demonstrate that he: (1) has a physical or mental impairment that substantially limits one or more of his major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g)(1-3); *Toyota*, 534 U.S. at 193. Gribben cannot meet any of these tests.

a. Gribben Is Not Substantially Limited In Working, a Major Life Activity.

Gribben alleges that he is substantially limited in the major life activity of working.[2] The ADA requires people who claim disability status to "'prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience. . . is substantial.'" *Toyota*, 534 U.S. at 199, citing *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 567 (1999). Mere evidence of a medical diagnosis is insufficient to prove disability status, and will not defeat a motion for summary judgment. *Toyota*, 534 U.S. at 195, 199.

When referring to the major life activity of working, "substantially limited" means:

> Significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities.

Murphy v. United Parcel Service, Inc., 527 U.S. 516, 523 (1999), quoting 29 C.F.R. § 1630.2(j)(3)(i).

Several courts have found that heat sensitivity does not substantially limit a person in the ability to work. In *Miller v. AT&T Network Systems*, 722 F. Supp. 633, 639 (Or. 1989), the plaintiff was not able to perform the essential functions of his job in work environments where the temperature exceeded 90 degrees Fahrenheit – the exact same

[2] Gribben does not contend that he is substantially limited in any other major life activity. He readily admits that he can stand, walk, talk, eat, etc.

restriction claimed here by Gribben. *Miller*, 722 F.Supp. at 640. The court found that Miller's heat sensitivity was not an impairment that "substantially" limited his ability to work since it did not restrict him with respect to a broad class of jobs. *Id*. at 639.

Similarly, in *Keating v. Gaffney*, 182 F.Supp.2d 278, 285 (E.D.N.Y. 2001), the plaintiff, a Highway Construction Engineering Aid at the Department of Public Works, claimed that he was "substantially limited" under the ADA in performing the major life activity of working because he was intolerant to heat and thus unable to cope with the working conditions in the Highway Construction Division. *Id*. at 245. Keating's job functions included working in the heat and sun and working with asphalt. *Id*. at 281. Keating further alleged that his heat intolerance restricted his ability to engage in a broad range of jobs that are regularly performed year round outdoors or in unairconditioned areas. *Id*. at 285-86. The court rejected Keating's claims, finding that his inability to perform this narrow range of jobs did not "substantially limit" his ability to perform the major life activity of working. *Id*. Moreover, Keating was able to perform other outdoor work if allowed occasional breaks and shelter. *Id*. at 285. Because Keating was still able to perform a broad range of jobs, even for his current employer, the court found that his condition did not substantially limit his ability to work and thus he was not disabled under the ADA. *Id*. at 286.

According to Gribben, his condition only prevents him from working jobs in excessive heat for sustained periods of time. DSOF ¶ 4. Furthermore, like the claimant in *Keating*, Gribben admits that he is able to perform outdoor work in the summer heat if he is able to take short breaks approximately every 20 minutes. DSOF ¶ 6. As such, Gribben is only limited with respect to those jobs which require that he work outdoors, in the heat of the day, continuously without breaks. These finite restrictions support the conclusion that Gribben is still able to perform a broad range of jobs, even jobs with UPS, without restriction or accommodation. An impairment, such as Gribben's, which disqualifies him from only a narrow range of jobs, is not considered substantially limiting. *Id*. at 285; *see also Heilweil v. Mount Sinai Hospital*, 32 F.3d 718, 723 (2d Cir. 1994);

Muller v. Costello, 187 F.3d 298, 313 (2d Cir. 1999); *Wernick v. Federal Reserve Bank*, 91 F.3d 379, 383 (2d Cir. 1996). Because Gribben is not substantially limited in the major life activity of working, he is not "disabled" within the meaning of the ADA and UPS is entitled to judgment as a matter of law on this claim.

b. Gribben Does Not Have a Record of Being Disabled.

To show discrimination based upon a record of an impairment, Gribben must demonstrate that at some point in the past he was classified or misclassified as having a mental or physical impairment that substantially limits a major life activity. *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1120-1121 (5th Cir. 1998). In addition to demonstrating that Gribben has a record of disability, he must also prove that UPS was aware of that record. *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 510 n.8 (7th Cir. 1998). Records Gribben could point to include education, medical or employment records. 29 C.F.R. pt. 1630. However, "[t]he record must be the one that shows an impairment that satisfies the ADA; a record reflecting a Gribben's classification as disabled for other purposes or under other standards is not enough." *Colwell v. Suffolk County Police Dep't.*, 158 F.3d 635, 645 (2d Cir. 1998).

Gribben's medical records, to the extent they have been shared with UPS, do not suggest a greater degree of limitation of major life activities than the impairment described in his Complaint. Gribben's claim based on a "record of disability" fails because the "record" does not reflect a substantial limitation of his ability to work. *See* discussion *supra* Part I.A.1.a. As such, Gribben's claim fails for the same reasons his substantial impairment claim fails. *See Keating*, 182 F.Supp.2d at 286 (finding claimant had no record of disability for the same reasons he was found to have no actual disability).

c. UPS Did Not Regard Gribben as Disabled.

There is no evidence to support the allegation that UPS regarded Gribben as disabled. "'A person is "regarded as" disabled within the meaning of the ADA if a covered entity mistakenly believes that the person's actual, nonlimiting impairment substantially limits one or more major life activities." *Murphy*, *supra* at 521-22 (citations

omitted). Gribben must allege that UPS regarded him as disabled within the meaning of the ADA, e.g., substantially limited in one or more major life activities. *Keating*, 182 F.Supp.2d at 286.

UPS has never regarded Gribben as disabled. Indeed, UPS's refusal to recognize his heart condition and heat sensitivity as a disability is the primary source of contention between the parties. Gribben has requested a reasonable accommodation from UPS on four different occasions. On each occasion, UPS denied the request because Gribben's heart condition and heat sensitivity did not meet the ADA definition of a disability. DSOF ¶ 20.

On these facts, it cannot be said that UPS regarded Gribben as disabled. In evaluating Gribben's request for an accommodation, UPS relied on its own independent medical examination of Gribben, performed by Dr. N.S. Prakash, who found that Gribben has no restrictions stemming from his underlying cardiomyopathy. DSOF ¶ 19. Dr. Prakash further opined that Gribben's decreased effort tolerance is directly attributable to his obesity and inactive lifestyle more than his underlying cardiac function. *Id*. Finally, Dr. Prakash found that Gribben's condition would not restrict him from performing his job as a shifter driver, and approved Gribben to return to work with UPS as a shifter driver without restriction.[3]

Based on both Dr. Prakash's assessment, and that of the OHS, UPS denied Gribben's request for an accommodation, as it determined that Gribben was not disabled within the meaning of the ADA. UPS did not deny Gribben's request for an accommodation based on discriminatory animus, but rather because the medical evidence provided did not demonstrate that Gribben was disabled within the meaning of the ADA.

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[3] Note that Dr. Peter Vasquez also performed an independent medical examination of Gribben. In his report, Dr. Vasquez indicated that there was no objective evidence that Gribben's heart condition decompensates under the physiologic demands of heat. DSOF ¶ 13. Furthermore, Dr. Vasquez noted that it was possible that the symptoms Gribben describes are due to a combination of his weight gain and his general physical deconditioning. *Id.*

Because Gribben cannot show that he was substantially limited in his ability to perform one or more major life activities, that he had a record of being substantially limited in his ability to perform one or more major life activities, or that UPS regarded him as substantially limited in his ability to perform one or more major life activities, he cannot state a prima facie case of disability discrimination and UPS is entitled to summary judgment on Gribben's disability claim.

2. Gribben Is Unable or Unwilling To Perform the Essential Functions of His Job With or Without Reasonable Accommodation.

Even if Gribben were "disabled" within the meaning of the ADA, he is unable or unwilling to perform the essential functions of his job with or without a reasonable accommodation and thus cannot establish a prima facie case of disability discrimination. To prove a prima facie case of discrimination under the ADA, Gribben must demonstrate that he is a "qualified individual with a disability," meaning a person with a disability who, with or without reasonable accommodation, can perform the essential functions of Gribben's job as a UPS shifter driver. 42 U.S.C. § 12111(8).

Gribben cannot perform the essential functions of a UPS shifter driver. The essential functions of a shifter driver require that Gribben work in an environment with variable temperatures and humidity (climate conditions), and tolerate exposure to outside inclement weather. DSOF ¶ 7. Dr. Peter Vasquez determined through scientific observation that shifter drivers spend less than one-half of their time inside of their vehicles. DSOF ¶ 14. Thus, even if Gribben is operating a truck that is equipped with air conditioning, he will only be exposed to air conditioning for, at most, a small portion of his shift. Gribben cannot be guaranteed a work environment with a temperature of 90 degrees Fahrenheit or less – at least not in Phoenix, Arizona. DSOF ¶ 14.

Even if Gribben was provided with an air conditioned truck, the temperature inside the truck would not drop down to the temperature required by Gribben's physician. In his report, Dr. Vasquez determined that during the summer months in Phoenix the temperature in air conditioned trucks exceeds 110 degrees during the warmest times of the

day. DSOF ¶ 14. Furthermore, the temperature inside the cabs does not drop below 90 degrees, despite air conditioning, until after 11:00 pm. DSOF ¶ 14. Thus, even if Gribben drove an air conditioned truck, the temperature inside the cab would greatly exceed the maximum temperature Gribben could be exposed to, for the majority of the working day.

Furthermore, even if Gribben had an air conditioned truck, UPS cannot guarantee that he would be able to sit in the cab and recover from the heat for the period of time required by his physician. In his deposition, Gribben's physician, Karl Moon, M.D., stated that for the air conditioning to have its desired effect upon Gribben, he would have to be exposed to the air conditioning for five to ten minutes, for every 20 minutes he spends in the heat. DSOF ¶ 30. Shifter drivers are constantly getting in and out of their vehicles to couple and uncouple the tractor-trailers they move. Thus, drivers may have to spend far more than 20 minutes outside the cabs of their trucks and they may not have five to ten minutes inside their trucks between moves. DSOF ¶ 30. Thus, even with an air conditioning accommodation, Gribben would not be able to perform the essential functions of a shifter driver.

It is undisputed that the position of shifter driver at UPS includes frequent exposure to extreme heat, regardless of whether the driver's truck is equipped with air conditioning. Gribben's restrictions make it impossible for him to perform the essential functions of this job with or without the accommodation of an air conditioned cab. Therefore, Gribben is not a qualified individual with a disability, and cannot establish a *prima facie* case of discrimination.

B. Gribben Cannot State a Prima Facie Case of Retaliation.

Gribben alleges that UPS retaliated against him for filing a Charge of Discrimination with the EEOC. To establish a prima facie case of retaliation under Title VII, Gribben must establish that (1) he engaged in a protected activity; (2) he suffered an adverse employment action; and (3) a causal link exists between the protected activity and the employment decision. *Kortan v. California Youth Auth.*, 217 F.3d 1104, 1112 (9th Cir. 2000). In other words, Gribben must present "evidence adequate to create an

inference that an employment decision was *based on* an illegal discriminatory criterion." *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312, (1996) (emphasis modified). Here, Gribben was discharged for gross insubordination – UPS's decision was not motivated by any retaliatory animus. DSOF ¶ 25. Gribben cannot prove that a causal link exists between his Charge with the EEOC and his subsequent discharge. Thus, Gribben is unable to set forth a prima facie case of retaliation under Title VII, 42 U.S.C. § 2000-e(3), and UPS is entitled to summary judgment.

UPS did not discharge Gribben in retaliation, but rather for gross insubordination after he refused to perform his duties as a shifter driver. On March 31, 2004, Gribben refused to begin work until he was given a truck with air conditioning. DSOF ¶ 23. UPS tried to accommodate Gribben's demand by procuring an air conditioned truck for him, but there were no such trucks available. DSOF ¶ 23. Gribben was instructed to operate a truck without air conditioning and he refused. Jerry Dalzell discharged Gribben for this reason alone. DSOF ¶ 25.

Because he was discharged for insubordination, Gribben does not have a claim for retaliation under Title VII. Insubordination and refusal to follow orders do not qualify as "protected activities" for purposes of a Title VII retaliation claim. *Hottenroth v. Village of Slinger*, 388 F.3d 1015, 1031-32 (7th Cir. 2004); *see also Love v. City of Chi. Bd. of Educ.*, 241 F.3d 564, 570 (7th Cir. 2001) ("…an employee's insubordination toward supervisors and coworkers, even when engaged in protected activity is justification for [adverse employment action]") (quoting *Kahn v. United States Sec'y of Labor*, 64 F.3d 271, 279 (7th Cir. 1995)). Thus, Gribben's claim fails to satisfy the first element of a prima facie cause of action for retaliation, and UPS is entitled to summary judgment on Gribben's retaliation claim.

Next, there is no sufficient causal link between Gribben's protected activity and the adverse employment action about which he complains. Gribben filed his original Charge with the EEOC on November 15, 2002. DSOF ¶ 18. Gribben was not discharged from UPS until March 31, 2004. In *Clark County School District v. Breeden*, 532 U.S. 268,

273-74 (2001), the Supreme Court held that, to establish a prima facie case of retaliation, the temporal proximity between the employer's knowledge of protected activity and an adverse employment action must be "very close." *Id*. citing to *O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001); *see also Richmond v. Oneok, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (finding a 3-month period to be insufficient); *Hughes v. Derwinski*, 967 F.2d 1168, 1174-1175 (7th Cir. 1992) (finding a 4-month period to be insufficient).

Here, over 16 months passed between Gribben's original discrimination Charge and his discharge from UPS. DSOF ¶ ¶ 18, 23. This extended period greatly exceeds *Breeden's* "very close" temporal proximity requirement. Furthermore, Jerry Dalzell, the UPS District Labor Relations Manager who made the decision to discharge Gribben, was unaware of Gribben's prior Charge of discrimination when he fired Gribben. DSOF ¶ 26. Because Dalzell had no knowledge of Gribben's 15 November 2002 Charge against UPS until after he discharged Gribben, he could not have possibly acted with a retaliatory motive. Without evidence of a causal connection between Gribben's protected activity and the adverse employment action about which he complains, Gribben's retaliation claim necessarily fails.

III. CONCLUSION

Gribben has failed to raise a genuine issue of material fact with respect to either his disability discrimination claim or his retaliation claim. Gribben is not disabled under the ADA. Mere sensitivity to hot weather does not substantially limit him in any major life activity. But even if Gribben is disabled, he is unable to perform the essential functions of a shifter driver with or without an accommodation. Even with air conditioning, temperatures inside the shifter trucks exceed Gribben's 90 degree temperature restriction. Thus, Gribben's disability discrimination claim necessarily fails.

Gribben is also unable to establish a claim for retaliation. Gribben was discharged for gross insubordination because he refused to work, not because he engaged in any protected activity. Also, there is no causal connection between Gribben's protected

activity and his discharge from UPS, since more than 16 months passed between his Charge of Discrimination and his discharge. Finally, the supervisor who decided to discharge Gribben had no knowledge of Gribben's protected activity until after the discharge was made. Thus, Gribben's retaliation fails. UPS is entitled to summary judgment on all of Gribben's claims.

RESPECTFULLY SUBMITTED this 18th day of November, 2005.

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I hereby certify that on the 18th day of November, 2005, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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